No. 48068-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

GARY BROWN, JR., Appellant.

Appeal from the Superior Court of Grays Harbor County
The Honorable David Edwards
No. 14-1-00390-3

REPLY BRIEF OF APPELLANT GARY BROWN, JR.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Rules

I. ARGUMENT

1. Mr. Snodgrass' Statement Regarding Mr. Brown's Confession Was Not Admissible as a Prior Inconsistent Statement.

Initially, the court instructed the State to impeach Mr. Snodgrass with the statement.

> You have passed up refreshing his recollection about 15 minutes ago. I granted you permission to treat him as a hostile witness. Take the statement from him, and read it to him, and ask him if that's what he told Detective Wallace. Do something besides continuing to just run in circles here, and have him be evasive. We are not getting anywhere. There is a way for you to impeach him with that statement, and I want you to do so.

(RP 318).

At that time, the statement had not been offered or admitted under ER 801(d)(i) and the admission was improper because Mr. Snodgrass had not testified inconsistently, so there was no basis to impeach him.

Later, after the State attempted to impeach Mr. Snodgrass, the State sought to admit the statement itself. At that time, the court admitted the statement under ER 801(d)(i):

> Evidence Rule 801 D provides that a statement is not hearsay if, sub 1, prior statement to a witness, the declarant testifies at trial, that's happened; is subject to cross examination concerning the statement; that happened; and the statement is inconsistent with declarant's testimony, and was given under oath. I understand that this statement, while I haven't seen it, it's been testified to that, it was given under oath. Mr. Snodgrass was, at best, equivocal about whether the substance of that statement is correct or

> not. That makes it inconsistent with his testimony. I am going to admit it.

(RP 335-36). The court did not review the statement before admitting it, noted that it was admissible if it was under oath, but made no finding about the voluntariness or truthfulness of the statement, and the court found that the statement was inconsistent because Mr. Snodgrass was equivocal about whether the substance of the statement was correct. (RP 335-36). Mr. Brown objected. (RP 335).

a. *Mr. Snodgrass' Statement Was Not Admissible as a Smith Affidavit Because the Statement Was Not Made at "Other Proceedings."*

The State argues that Mr. Snodgrass' statement was properly admitted as substantive evidence because it was a *Smith* affidavit and admissible under ER 801(d)(1)(i). *See State v. Smith*, 97 Wash.2d 856, 651 P.2d 207 (1982). Under ER 801(d)(1)(i) a statement made under penalty of perjury may be admitted as substantive evidence under certain circumstances.

> A statement is not hearsay if . . .
>
> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or *other proceeding*, or in a deposition ...

ER 801(d) (emphasis added).

In Smith, the court declined to find that all affidavits signed under penalty of perjury are admissible as "other proceedings." *Smith*, 97 Wash.2d at 861. "We do not interpret the rule to always exclude or always admit such affidavits." *Id.* To determine whether an affidavit is admissible, the courts consider four factors:

> (1) whether the witness voluntarily made the statement; (2) whether there were minimal guaranties of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement.

State v. Thach, 126 Wash. App. 297, 308, 106 P.3d 782, 788 (2005)

The statement was taken as part of an investigation to determine probable cause and Mr. Snodgrass was subject to cross-emanation. The issue is whether the statement was voluntary and truthful.

In *Smith*, the court found that the statement was voluntary and there were minimal guarantees of truthfulness where it was made under oath and subject to penalty of perjury, it was notarized, and it was written by the witness. *Smith*, 97 Wash. 2d 856. In *Thach*, the affidavit was admissible where the witness completed part of the affidavit herself and signed it under penalty of perjury. *State v. Thach*, 126 Wash. App. 297, 308, 106 P.3d 782, 788 (2005). In *Nelson*, a prior sworn statement was found reliable and admitted where, although the witness did not write the

statement herself, she testified that she made a statement, the officer wrote her statement, and she read it before signing it. *State v. Nelson*, 74 Wash. App. 380, 389, 874 P.2d 170, 175 (1994).

However, in *Nieto*, the court held that a statement was not admissible because it did not contain the minimum guarantees of truthfulness where it was written on a pre-printed printed form with ambiguous boilerplate language that the statement was under the penalty of perjury, there was no notary present, there were no other formal procedures, and the witness testified that she did not read the language regarding the statement being under the penalty of perjury, it had no meaning to her, and no one read it to her. *State v. Nieto*, 119 Wash. App. 157, 163, 79 P.3d 473, 477 (2003).

In this case, the statement said it was under oath and subject to penalty of perjury, but it was not notarized and it was not written by Mr. Brown. The officer wrote the statement and Mr. Brown testified that he did not recall whether or not he read it before signing it. (RP 323). Throughout his testimony, Mr. Snodgrass maintained that he did not remember the conversation with Mr. Brown which was contained in the affidavit. Therefore, this case is very different than *Smith* and raises concerns regarding the truthfulness of the statement.

b. *Mr. Snodgrass' Statement Was Not a Prior Inconsistent Statement.*

Even if Mr. Snodgrass' statement is considered a statement "given under oath subject to the penalty of at a trial, hearing or other proceeding" under *Smith*, the statement is only admissible if it is *inconsistent* with the testimony at trial.

> A statement is not hearsay if . . .
>
> > The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . *inconsistent with his testimony,* and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ...

ER 801(d) (emphasis added).

This year, our Supreme Court affirmed *Smith* in *Otton*, where a sworn statement was admitted after the victim in a domestic violence case testified that her prior statement to the police was false. *State v. Otton*, 185 Wash. 2d 673, 676, 374 P.3d 1108, 1110 (2016). In *Smith*, the victim's sworn statement implicating the defendant was admitted after the victim testified at trial that another man, not the defendant, assaulted her. *Smith*, 97 Wash. 2d at 857. It does not appear that there are any cases where a *Smith* affidavit was admitted under ER 801(d)(i) where the witness' testimony was not clearly inconsistent with the prior sworn statement.

While the court in *Allen S.* said it was not addressing admissibility under ER 801(d)(1)(i), the analysis regarding whether or not a statement is inconsistent is the same. *State v. Allen S.*, 98 Wn. App. 452, 466, 989 P.2d 1222, 1230 (1999). And, in *State v. Robbins*, the exclusion of a sworn statement was affirmed, in part, because there was no inconsistent statement when the witness refused to testify. *State v. Robbins,* 25 Wash.2d 110, 169 P.2d 246 (1946).

In this case, Mr. Snodgrass' testimony at trial was not inconsistent with his statement to the police. At trial, he testified, repeatedly, that he did not remember the conversation with Mr. Brown. He did not testify about the content of the conversation or claim that Mr. Brown told him something different than in the prior statement he signed.

The State argues the statement is inconsistent in two regards: 1) Mr. Snodgrass testified that he went that Mr. Brown came to his house, but the statement says Mr. Snodgrass went to Mr. Brown's house, and 2) Mr. Snodgrass testified that Mr. Brown told him he was accused of burning a trailer. First, at trial, Mr. Snodgrass testified that the last time he saw Mr. Brown was when Mr. Brown came to his house. (RP 312). However, he did not testify that that was the same day as the conversation referenced in the prior written statement. He also testified that he ran into Mr. Brown when he was on his way to Mr. Brown's house and that he

gave him a ride. (RP 313). In the written statement, it says that Mr. Snodgrass stopped by Mr. Brown's house on his way to town. (Exh. 57). This testimony is, for the most part, consistent with the written statement that he went to Mr. Brown's house. To the extent that those statements are inconsistent, it is minimal and did not justify admission of the entire statement. At most, the State should have been allowed to impeach Mr. Snodgrass with regard to where he met Mr. Brown; nothing more.

Second, Mr. Snodgrass testified at trial, "He was saying that they were accusing him of burning down some --." (RP 316). In the written statement, it says that Mr. Brown told Mr. Snodgrass that police came to his house to arrest him for arson. (Exh. 57). Those statements are not inconsistent. Even if this court were to find that they were inconsistent, again, it does not justify the admission of the entire statement. At most, the State should have been allowed to impeach Mr. Snodgrass only with the inconsistent portions of his statement.

Therefore, Mr. Snodgrass' testimony at trial was not inconsistent with his prior statement; and, therefore, the prior statement was not admissible under ER 801(d)(i).

2. The Trial Court Improperly Assumed the Role of Prosecutor, in Violation of the Separation of Powers and Due Process, When the Court Instructed the State on How to Impeach Its Witness.

The State argues that the court simply made a sua sponte objection. While a court may raise an objection to exclude inadmissible evidence, as the State argues in its brief, that is not what happened in this case. In this case, the court interrupted the State's ineffective cross-examination of a witness and instructed the State on how to impeach the witness. As argued in appellant's brief, that was improper.

3. The Trial Court Improperly Allowed Mr. Mohr to Give an Expert Opinion When He Was Not Qualified to Given an Expert Opinion.

The State argued that Mr. Mohr did not testify as an expert; he simply testified as to his past experience under ER 701. ER 701 states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

The State argued that Mr. Mohr's testimony was similar to the officer's testimony in *Kunze*, where the officer responded to a murder scene where there were open drawers and cabinets, but the contents were undisturbed and testified that it was unusual and it might have been staged to look like

a burglary. *State v. Kunze*, 97 Wn. App. 832, 858, 988 P.2d 977, 992 (1999). The court held that "they were testifying to inferences readily understandable by the jury . . . ." *Id.*

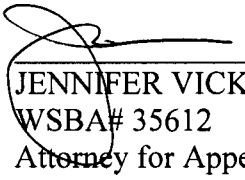
This case is very different. The testimony was not regarding inferences readily understandable to a jury, like that it would not make sense for someone to open drawers during a burglary and leave the contents of the drawer undisturbed. Mr. Mohr testified regarding the cause of a fire. That is very specific, scientific testimony that is outside the knowledge of most jurors. Mr. Mohr testified that electrical fires normally engulf the entire trailer, but this fire was concentrated in the center of the trailer. (RP 56-57). He also testified that the fire moved when he sprayed it with a hose, which has happened in prior fires that have been started with diesel fuel or something similar. (RP 57-58). In closing argument, the State argued that because Mr. Mohr testified that the fire was concentrated and it moved when it was hit with water, it was suspicious. (RP 426). Mr. Mohr could have described what he saw, but he should not have been allowed to give an opinion that, based on his observations, it was not an electrical fire and that it was started with an accelerant. This was not lay opinion, this was expert testimony and Mr. Mohr was not qualified to give an opinion as to the cause of the fire.

I. CONCLUSION

In conclusion, the affidavit did not have minimal guarantees of truthfulness and it was not inconsistent with the testimony at trial, so it should not have been admitted; the trial court did not sua sponte object to evidence; the trial court improperly instructed the State on how to admit evidence; and, Mr. Mohr's testimony was not lay testimony, but scientific testimony, which required an expert, and he was not qualified to give an expert opinion regarding the cause of the fire. For all the reasons stated above and in appellant's brief, this matter should be reversed and remanded for a new trial.

Dated this 21st day of November, 2016.

Respectfully Submitted,



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The undersigned certifies that on this day correct copies of this Appellant's Reply Brief were delivered electronically to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

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Signed November 21, 2016 at Tacoma, Washington.

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